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FOR
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BEFORE THE

HOUSE COMMITTEE ON RESOURCES

SUBCOMMITTEE ON FISHERIES, CONSERVATION, WILDLIFE AND OCEANS

ON

H.R. 4781

THE REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT (MMPA)

JUNE 13, 2002

Mr. Chairman, members of the subcommittee, thank you for the opportunity to appear before you today to discuss H.R. 4781, the Marine Mammal Protection Act (MMPA) Amendments of 2002.

I. INTRODUCTION

On behalf of the United States Navy, I recommend that your committee and the Congress amend the definition of "harassment" in the MMPA. The current definition of harassment is overly broad and subject to varied interpretations, which has resulted in delayed deployment of mission-essential equipment and curtailment/cancellation of realistic training and critical testing. The Navy has no desire to roll back the environmental progress made over the last 20 years. Indeed, the Navy is fully committed to its environmental responsibilities; however, the shortcomings of the current definition of harassment are beginning to affect the Navy's ability to ensure our Sailors and Marines are fully prepared to carry out their combat mission. Adoption of the harassment definition, proposed by the Clinton Administration's MMPA Reauthorization Act of 2000, having been agreed upon by the Departments of Commerce, Interior, and Defense, and the Marine Mammal Commission, and more recently advanced by the Bush Administration, as part of the Administration's Readiness and Range Preservation Initiative, would balance two national imperatives – Military Readiness and Environmental Conservation.

II. READINESS

Our Navy must provide credible, combat-ready naval forces to sail anywhere, anytime, as powerful representatives of American sovereignty. In the weeks following September 11, naval forces were the vanguard of our Nation's efforts against terrorism. Navy and Marine Corps carrier aircraft, in concert with U.S. Air Force bombers and tankers, flew hundreds of miles beyond the sea, destroying the enemy's ability to fight. Sustained from the sea, U.S. Marines, Navy SEALS, Seabees, and Special Operations Forces worked with allies to free Afghanistan from the Taliban Regime and Al Qaeda terrorist network. Currently, naval forces engaged in the Global War on Terrorism are deployed to multiple theaters of operation. Our mission is far from over; and as we look toward the next phases of our operations, we come before you to express our concern over ever-increasing impediments on our ability to execute our highly successful training procedures. These impediments have the potential to undermine readiness and compromise the young Sailors, Airmen, and Marines we send into harm's way.

Having recently returned from Operation Enduring Freedom (OEF) where I served as the Commander, U.S. Naval Forces Central Command, and Commander, Fifth Fleet, I know first hand that readiness is the foundation of our Fleet's war fighting capability, and I know from my years of experience that there is a direct link between Fleet readiness and training. For the Navy, this means essential testing and realistic training opportunities, in both open-ocean and littoral environments. Our Navy has developed, through years of experience, an extremely effective and proven training process that stresses our forces under combat-like conditions. This process guarantees that our naval forces are better trained in addition to being better equipped than our potential adversaries. Assured access to quality training methods, technologies, and realistic training at our Range/Operating Area (OPAREA) Complexes ensures our ability to exercise all of the individual, unit level, and multi-unit skills necessary to prevail decisively in combat.

Just like our land-based training ranges, OPAREAs in the oceans give deploying naval forces the opportunity to gain combat-like experience before actually going into harm's way. We know empirically, based on our experience during previous wars, that aviators, for example, who survive their first five decisive engagements in combat are likely to survive the war. We use training ranges, likewise, to simulate a combat-like environment in order to enhance the success and survival rate of our Sailors and Marines.

Training in the ocean environment is not a sterile, academic evolution for us. Quite the

contrary, we are facing existing and emerging threats from naval forces of potential adversaries. New, quiet diesel submarines and anti-ship, submarine launched cruise missiles are being introduced. These pose a potentially formidable threat to our Sailors and Marines, who are called upon to project power from the sea or maintain open sea lanes in such places as the Arabian Gulf through which much of the world's oil flows. In order to successfully locate and defend against these threats, our Sailors must train realistically with both active and passive sonar. In executing the anti-submarine warfare mission, sonar is the key to survival for our ships and Sailors, because it is both the eyes and ears for our combatant units.

III. BALANCING MILITARY READINESS AND THE ENVIRONMENT

I come before you to discuss the interplay between two national imperatives: military readiness and environmental conservation. We should not view these issues in isolation from one another for they are not mutually exclusive. However, currently, they are out of balance.

Some extremely well intentioned interests advocate application of the *"precautionary principle"* for the protection of marine mammals. This principle holds that in the absence of evidence to the contrary, we must assume our training will adversely affect the environment -- essentially requiring us in many cases to prove the negative. Although a noble goal, it has immediate and adverse consequences on our ability to prepare our young men and women in uniform for the challenge of protecting American interests both around the world and, unfortunately, in the United States itself. As applied to the Navy, the precautionary principle is a serious matter. Proving a negative is often difficult if not impossible, often leading to cancellation, curtailment or adjustment of our training to avoid even the possibility of disturbing marine mammals.

We do not seek your assistance today to exempt the Navy from its environmental responsibilities. Rather, we are merely here to seek your assistance in striking a sensible balance that will not only protect marine mammals but will also enable the Navy to train realistically. We are proud of our efforts to preserve this balance in being a good steward, especially as it relates to the protection of Northern Right Whales off the east coast of Florida, marine mammal research, and interagency cooperation to preserve the world's oceans.[1]

IV. CHALLENGES POSED BY THE MARINE MAMMAL PROTECTION ACT

The Marine Mammal Protection Act's (MMPA) definition of "harassment" has been a source of confusion since the definition was included in the 1994 amendments to the statute. The statute

defines "harassment" in terms of "annoyance" or the "potential to disturb," vague standards that are vulnerable to inconsistent interpretation. Due to the ambiguity of this definition, the National Marine Fisheries Service (NMFS) of the National Oceanic Atmospheric Administration in the past has interpreted a broad array of reactions that constitute harassment, noting, for example, that "[a]ny sound that is detectable is (at least in theory) capable of eliciting a disturbance reaction by a marine mammal." Also, "an incidental harassment take is presumed to occur when marine mammals . . . react to generated sounds or to visual cues." Taken literally, this would result in a "take" by harassment if the wake from a naval vessel caused a seal sleeping on a buoy to dive into the water. An interpretation this broad could result in our having to submit all our naval vessels to a lengthy permitting process for simply leaving the pier.

The vagaries of the definition of harassment noted above make it very difficult for Navy exercise planners and Navy scientists to determine if a take permit is required before commencing mission-essential training or testing. The Navy is not alone in its opinion that the lack of clarity in the MMPA has led to extremely restrictive and inconsistent interpretations of the definition of harassment. In testimony before Congress, the Assistant Administrator for NMFS stated that, "NMFS has experienced difficulties with respect to implementation and interpretation of the current definition of harassment." An example of this occurred during the review of the Navy's Environmental Impact Statement (EIS) for the USS WINSTON CHURCHILL (DDG-81) ship shock test. Trying to inject some certainty into the harassment standard NMFS has, within the rule-making process, clarified that simple, singular, reflex actions (e.g., alert, startle, dive response stimulus) by marine mammals that have no biological context, are not effects constituting harassment. Even though the Navy adopted NMFS' guidance for the CHURCHILL ship shock test ambiguity in the definition of harassment increased Navy's litigative risk. Although generally supportive of the Navy's analysis of the proposed ship-shock testing prepared under the National Environmental Policy Act, the Marine Mammal Commission (MMC) pointed out, in its letter of March 30, 2000, that in its view the Navy's assessment did not "appropriately reflect the definition of [harassment], . . . [because] any behavioral disruption would technically constitute harassment, whether or not if affects survival or productivity" and therefore would require an authorization. MMC's interpretation of the definition illustrates the precise problem with the current definition of harassment that concerns the Navy.

Assuming an authorization is required for certain Navy training or testing, the application process requires at least four months for an incidental harassment authorization and sometimes years to

complete a multi-year authorization issued under regulations, and then the contingency Letter of Authorization is effective for only one year. Time constraints surrounding the application process have proven difficult to meet for the naval service. Because naval operations are expeditionary in nature, and tied to world events, exercise planning and testing done in conjunction with training is often done on short notice. This sometimes precludes identification of training and testing platforms and locations far enough in advance to factor in the lengthy permitting application process required by the MMPA.

Examples of this dilemma can be seen in Office of Naval Research (ONR) tests designed to measure sound in the water as it relates to improving the Navy's anti-submarine warfare capabilities. Over the past several years, ONR has had to curtail or stop elements of various tests due to potential challenges linked to the MMPA's vague definition of harassment and its lengthy permitting requirements. In May 2000, for example, disagreement with the regulatory community ensued over ONR's analysis of impacts on listed marine mammals. Experiences like these led ONR, in a subsequent test, to spend $800,000 for mitigation measures to avoid even the possibility of disturbing a marine mammal.

More recently, essential anti-ship cruise missile training for the CARL VINSON Battle Group, which participated in Operation Enduring Freedom (OEF), was actually cancelled because an Incidental Harassment Authorization (IHA) was not in place to cover the "potential to disturb" harbor seals when our target drones flew over them enroute to the ships. This resulted in the deployment of three ships of the Battle Group without benefit of an anti-ship cruise missile defensive exercise. This is another example of the challenges posed by the current definition of harassment and the permitting process under the MMPA.

To date, the operational Navy has been able to avoid these challenges only by altering or "dumbing-down" its training and adopting mitigation measures that eliminate even the possibility that a training event will disturb a marine mammal, let alone harm one. In some cases, these challenges have been unavoidable; and consequently our readiness has been affected. For example, the Navy has yet to deploy SURTASS Low Frequency Active (LFA) sonar, notwithstanding an investment of $10M in a scientific research project conducted by independent scientists, who concluded that the potential impact on any stock of marine mammals from injury is negligible, and the potential effect from significant change in a biologically important behavior is minimal.

V. SUPPORT FOR AMENDING MMPA

The National Research Council (NRC), which is part of the National Academy of Sciences, shares the concerns of both the Clinton and Bush Administrations, over the current definition of harassment. According to the NRC, "It does not make sense to regulate minor changes in behavior having no adverse impact; rather, the regulations must focus on significant disruption of behaviors critical to survival and reproduction, which is the clear intent of the definition of harassment in the MMPA."[2] Further, the NRC stated, "If the current interpretation of the law for level B harassment (detectable changes in behavior) were applied to shipping as strenuously as it is applied to scientific and naval activities, the result would be crippling regulation of nearly every motorized vessel operating in U.S. waters."[3] Ultimately the NRC recommends defining level B harassment in terms of "meaningful disruption of biologically significant activities," that include migration, breeding, care of young, and feeding.[4] Additional support for amending the definition of harassment is found in a report on MMPA reauthorization prepared for the 106th Congress. Some scientists, according to this report, "would like to see the definition of harassment revised to where it would be applicable only to situations where actions would reasonably be expected to constitute a significant threat to an entire marine mammal stock."[5]

During the Clinton Administration, the Department of Commerce, Department of Interior and Department of Defense, and Marine Mammal Commission. proposed a definition of "harassment," which was accepted by the Office of Management and Budget and then included in that Administration's proposed reauthorization of the MMPA in 2000. The Bush Administration's Readiness and Range Preservation Initiative reflects continuing interagency agreement on this point. It clarifies that "harassment" applies only to injury or significant potential of injury, disturbance or likely disturbance of natural, behavior patterns to the point of abandonment or significant alteration by a specific animal. As such, the Navy believes that this standard would strike the proper balance between protecting marine mammals and providing the military with sufficient flexibility to conduct training and other operations essential to national security. It is important to note that the Navy will remain subject to the MMPA for injury and behavioral changes that affect significant biological functions.

In short, amending the definition of "harassment," as proposed by the Administration, would eliminate application of the MMPA to benign naval activities that cause only minor changes in marine

mammal behavior; eliminate the need for mitigation that undermines critical training in order to avoid any liability for unpermitted takes by activities having only benign effects; increase training flexibility by allowing greater use of acoustical sources, without immunizing the Navy from regulation of activities that have a significant biological effect on marine mammals; and eliminate impediments to deployment of mission-essential systems.

VI. CONCLUSION

The current lack of balance in the use of the term ***"harassment"*** in the MMPA has affected our ability to deploy mission-essential equipment and to train realistically for the challenges our country faces. I urge you to consider adopting the amendment to the definition of "harassment" proposed by the Administration's Readiness and Range Preservation Initiative in your reauthorization of the MMPA.

APPENDIX A: EXAMPLES OF MARINE MAMMAL CONSERVATION

The Navy has initiated significant actions to minimize potential harm to marine mammals and educate Sailors about marine mammals and the Navy's procedures for protecting species. Particularly noteworthy measures include training, steaming procedures, special procedures around the Hawaiian Islands, research and development efforts, and mitigation measures during ship shock trials. The following paragraphs offer some specific examples of our marine-mammals successes.

- ***Training*.** The Navy developed marine mammal training videos to educate personnel on their environmental protection responsibilities while at sea. Two of these videos specifically focus on procedures to avoid endangering the Northern Right Whale (NRW). To help ensure understanding of the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and local mitigation plans, the Navy instituted dedicated training for operational training range personnel, and afloat lookouts and bridge personnel. Afloat lookouts and bridge personnel are being trained with both the

Navy marine mammal spotting training video and the Whale Protection "Wheel." Additionally, lookouts, bridge personnel, and sonar operators conduct specific training on mitigation plan actions prior to operations. Further, the Navy is including relevant ESA and MMPA topics in Navy-wide officer training curriculum.

- ***At-Sea Procedures.*** The Navy directed commanding officers at sea to report proscribed information to regional commanders, Fleet commanders, and the Chief of Naval Operations in the event of encountering a whale. The report should include the information on the location and other operational data, and provide a description of the whale in as much detail as possible (e.g., length, fin shape, color, and any other distinguishing features). The commanders also document all actions taken to avoid or mitigate close encounters.
- ***Special Procedures within 200 nm of the Hawaiian Islands.*** For all air, surface, and submarine units, special procedures associated with the endangered humpback whale exist when operating within 200 nm of the Hawaiian Islands. Humpback whales migrate in winter to Hawaiian waters and generally depart the area in mid-May. The Navy, in compliance with National Marine Fisheries Service regulations, prohibits any vessel to approach within 100 yards or any aircraft to operate within 1,000 feet of a humpback whale.
- ***Research and Development.*** The Navy is using its expertise in underwater sound to detect and monitor marine mammals in several ocean regions. This unique capability provided the first insights to the behavior of the large Baleen whales in the North Pacific Ocean, particularly in the deep ocean basins. Navy sensors can detect the "calls" of these large mammals from hundreds of miles away; five years of underwater acoustic data have furnished scientists indications of animal abundance and spawned hypotheses of sub-populations, migrations routes, and habitats. These data revolutionize the understanding of where these animals are located and when they are there. Techniques of this initial work are transitioning to other practical applications where Navy is leading development of a marine mammal census solely by detecting and processing marine mammal vocalizations. The Navy is focusing on a multi-year research and development program composed of several projects. These projects will result in a dynamic, comprehensive, global marine mammal database; the ability to detect, classify, and monitor marine mammal populations acoustically; and enhanced survey processes and predictive models. Navy continues to invest in marine mammal research.

The Navy will conduct ocean-going surveys to establish population densities of marine mammals in our Operating Areas. Marine Mammal Density Data will also include further study on assessing the impact of Navy training on protected and endangered species. This component is the Navy's knowledge advancement effort and applies the scientific knowledge gained through the Navy marine mammal R&D program to minimize potential restrictions on training. Our current research program supports primary research funded at approximately $9 million in FY 2002 and seeks to increase the level of knowledge of marine mammal population densities, distribution, and hearing physiology.

- ***Safer Shock Trials for Marine Mammals.*** Every Navy ship type is subjected to a thorough series of tests that determine whether it can withstand the unforgiving punishment wrought by sea combat. USS WINSTON S. CHURCHILL (DDG-81), the third ship in the new Flight IIA series of AEGIS guided missile destroyers, was subjected to a shock trial comprised of three detonations off the coast of Florida. The shock trial essentially involves the detonation of 10,000 pounds of explosive charges near the ship. To protect marine life from potential harm from the explosions, the Navy developed an extensive mitigation and monitoring program that focused on marine animals. The area selected for the trials underwent extensive aerial surveys two days prior to each detonation and was found to have low marine mammal and turtle populations. On the day of each detonation, aerial surveys, shipboard monitoring and passive acoustic monitoring were conducted. If any marine animals were sighted and/or detected within two nautical miles of the charge, detonation was delayed. Immediately following each detonation and for seven days, the testing area was monitored for a minimum of three hours each day for any signs of injured or dead marine animals. No injured or dead marine animals were observed.
- ***Conserving Living Marine Resources with DOC and DOT***. The Office of Naval Intelligence (ONI) entered into a Memorandum of Understanding with the Departments of Transportation and Commerce relating to the enforcement of domestic laws and international agreements that conserve and manage U.S. living marine resources. ONI must monitor, collect, and report upon the identity and location of vessels that may be in violation of U.S. laws and international agreements that conserve and manage the living marine resources of the United States; sanitize information to the lowest possible level to ensure ease of dissemination to field units; and inform the U.S. Coast Guard and the National Marine Fisheries Service (NMFS).

- ***Northern Right Whale Migration Monitoring.*** The Navy, Coast Guard, and Army Corps of Engineers play a major role in protecting the Northern Right Whale (NRW), one of the most critically endangered marine mammals with only about 300 animals in the western North Atlantic. Activities include funding the Early Warning System aerial surveillance, producing awareness videos, training vessel crews on ways to operate without impacting these mammals, and preparing and disseminating the sighting reports. The Navy spends approximately $95,000 per year on just these efforts. NRWs transit through waters off of the coasts of South Carolina, Georgia, and Florida, in search of warmer, shallow coastal waters to give birth to their calves. Adult whales can reach sizes of up to 55 feet long and calves can reach sizes of 20 feet long. Since 1997, as a result of consultations with NMFS, the Navy agreed to employ year round measures designed to protect NRWs and other endangered species while operating in a special "consultation area," encompassing sea space from Charleston, SC, southward to San Sebastian Inlet, FL, and from the coast seaward to 80 nautical miles from shore. Parts serve as critical habitat and winter calving grounds and nursery areas for the migratory NRWs. The critical habitat encompasses an area from SUBASE Kings Bay, GA, to south of Naval Station Mayport, FL, including offshore shipping lanes and operating areas where Navy units conduct exercises.

  The Navy has developed steps specifically designed to safeguard the whales during the calving season from December 1 to March 31. A series of Navy-developed training aids, videos, posters and other hand-out materials help educate ships' lookouts and navigators on Navy vessels and aircraft about the whale and the Navy's requirements. By its own initiative, Navy surface ships and submarines are posting vigilant lookouts and bridge watchstanders trained to identify and report NRWs. Navy vessels use extreme caution and proceed at slow safe speed during transit through critical habitat. Consistent with existing regulations, Navy vessels also endeavor to maintain a buffer of 500 yards from right whales in any area. In addition, Navy ships will not conduct north-south transits in the critical habitat area or while operating in an Associated Area of Concern, which extends another five miles eastward beyond the federally designated critical habitat. At the Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC), a team of Navy operations specialists is the designated coordinator for operating areas and related air space and also mans the "Whale Fusion Center." The team coordinates ship and aircraft clearance into the NRW critical

habitat and the surrounding operating areas based on prevailing weather, surface conditions, whale sightings, and the mission or event to be conducted. The communications network and reporting system that is in place ensures the widest possible exchange and dissemination of NRW sighting information to Department of Defense, Coast Guard, and civilian shipping vessels. Prior to entering the critical habitat, Navy ships are required to contact the FACSFAC to obtain the latest whale sighting information and must report whale sightings to the center.

The New England Aquarium (NEA) reported that this past season was a banner year for right whales with more than 16 calves documented, and acknowledged the shipping community, commercial and military for their efforts to limit the potential for ship/whale collisions. NEA gave FACSFAC particular credit for an incredible job getting the whales' locations to the people that need them.

In addition to FACSFAC's stewardship efforts, the Navy Region South East (NRSE) works in coordination with the Florida Department of Environmental Protection (FDEP), Georgia Department of Natural Resources, the New England Aquarium, the Marine Mammal Commission, and other partners within the Southeastern U.S. Implementation Team (SIT) for the Recovery of the Northern Right Whale headed by NMFS. During the 2000 to 2001 season, more than 500 whale sightings were reported to FACSFAC. During the entire 1999 to 2000 season, 52 sightings were reported to FACSFAC. NRSE and FASCFAC are also a major component of the SIT's NRW Early Warning System (EWS). In fact, CNRSE contributes nearly $100,000 annually to support the EWS. Since 1996 there have been no whale deaths from ship strikes. Improved EWS aerial surveying, better sighting techniques, and more efficient sighting reporting procedures by FASCFAC have significantly reduced the potential for ship-whale collisions.

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[1] For additional examples of Navy 's successful conservation efforts relating to marine mammals, see attachment A.

[2] National Research Council, Marine Mammals and Low-Frequency Sound: Progress Since 1994 (National Academy Press 2000).

[3] Id.

[4] Id.

[5] Buck, E.H., Marine Mammal Protection Act: Reauthorization Issues for the 106th Congress (1999).